Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

ARUNA KAVALI,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is the Texas Court of Appeals opinion in this case finding the evidence sufficient to sustain the verdict inconsistent with the standards for analysis of sufficiency of the evidence challenges set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 62 L.Ed.2d 560 (1979)?

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Petitioner, Aruna Kavali, hereby petitions for a writ of certiorari to review the opinion of the Texas Court of Appeals, Fifth District (entered November 4, 2002, rehearing denied January 10, 2003) as upheld by the Texas Court of Criminal Appeals (Petition for Discretionary Review refused June 11, 2003), affirming the Petitioner's conviction for capital murder.

OPINION BELOW

The opinion of the Texas Court of Appeals, Fifth District, dated November 4, 2002 is:

Aruna Kavali v. The State of Texas, No. 05-01-00835-CR.

This opinion was unpublished. A copy of this opinion may be found in Appendix A of this Petition. The order of the Court of Appeals denying rehearing, dated January 10, 2003, may be found in Appendix B of this Petition.

The order of the Texas Court of Criminal Appeals refusing Petitioner's Petition for Discretionary Review, seeking review of the Court of Appeals opinion, dated June 11, 2003, may be found in Appendix C of this Petition.

STATEMENT OF JURISDICTION

The Texas Court of Appeals affirmed the Petitioner's conviction on November 4, 2002. Rehearing was denied on January 10, 2003. Petitioner filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals and this Petition was refused June 11, 2003.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257.

STATEMENT OF THE CASE

Petitioner, Aruna Kavali, was charged with the offenses of Capital Murder and Injury to a Child alleged to have occurred on or about December 8, 1999. (CR 2, p. 248). A jury trial was held from April 30, 2001, through May 4, 2001 after which Petitioner was found guilty of capital murder. (CR 2, P. 308). The trial court sentenced Petitioner to life in prison. (CR 2, p. 309). Notice of Appeal was given to the Court of Appeals for the Fifth District of Texas. On November 4, 2002, the Court of Appeals affirmed the conviction. Petitioner filed a Motion for Rehearing on December 3, 2002, which was denied on January 10, 2003. Petitioner filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals which was denied June 11, 2003.

Petitioner was accused of murdering her baby. In the Texas Court of Appeals and the Texas Court of Criminal Appeals, Petitioner challenged the sufficiency of the evidence, citing the due process clauses of the U. S. Constitution, amends. V and XIV and relying on *Jackson v. Virginia*, *supra*. In Petitioner's brief in the Texas Court of Appeals, under Issue I, Petitioner stated:

> "In reviewing the sufficiency of the evidence, the court is required to view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the elements of the offense beyond a reasonable doubt. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2879, 62 L.Ed.2d 560 (1979). The due process clauses of the U. S. and Texas Constitutions protect a defendant against conviction "except upon proof

> beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 297 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). See also, *Richardson v. State*, 879 S.W.2d 874 (Tex. Crim. App. 1993)."

(Appellant's Brief, p. 13).

In the Petition for Discretionary Review, Petitioner stated the following:

> "The opinion of the Court of Appeals on this issue is totally devoid of any reasoning. Moreover, a proper application of *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2879, 62 L.Ed.2d 560 (1979) and the Texas cases following it would result in a finding that the evidence in this case is legally insufficient."

(Petition for Discretionary Review, p. 11).

The Texas Court of Appeals rejected this argument and found the evidence sufficient by stating in its opinion:

> "We conclude this evidence is legally and factually sufficient to show appellant committed the offense of capital murder. See Jackson, 443 U.S. at 319."

(Court of Appeals opinion, p. 4).

REASONS FOR GRANTING THE WRIT

Question for Review

Is the Texas Court of Appeals opinion in this case finding the evidence sufficient to sustain the verdict inconsistent with

the standards for analysis of sufficiency of the evidence challenges set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 62 L.Ed.2d 560 (1979)?

Reasons for Granting the Writ

This Petition should be granted because the Texas Courts have applied the sufficiency of the evidence review in a manner inconsistent with due process of law and in contravention of the due process clauses of the U. S. Constitution.

There was no evidence that established that Petitioner committed the acts that caused the death of her baby. Instead, the State's argument and the jury verdict were based on the fact that she was the only person home when the baby was discovered to have been injured and speculation that she must have been responsible. Upholding a verdict on this basis is a direct violation of due process.

The opinion of the Court of Appeals on this issue is totally devoid of any reasoning. Moreover, a proper application of *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2879, 62 L.Ed.2d 560 (1979) would result in a finding that the evidence in this case is legally insufficient. Based on this improper application of *Jackson*, this Petition should be granted.

The Petitioner submitted a strong argument in her brief as to why the evidence in this case is insufficient. This argument emphasized the following points:

1. There is absolutely no evidence that Petitioner did any of the acts alleged and there is no evidence that she was responsible for causing the death of her baby. The evidence,

without dispute, shows that there were at least four adults and a child at the Kavali home in the hours leading up to the discovery of the injured baby. (RR 3, p. 20-24, 77; RR 4, 138-145, 177). Although the other people left the home shortly before the injured child was discovered, the State's evidence fails to establish beyond a reasonable doubt that one of the other people did not cause these injuries to the baby. There is no evidence concerning the time of death of the child and the evidence does not show, with any degree of certainty, when those injuries occurred and it is equally plausible that any one of these other people could have caused the injuries.[1] Despite the clarity of this argument in Petitioner's brief, the Court of Appeals opinion wholly fails to discuss this.

2. There is no evidence that the Petitioner's explanation of the events was not true. She told the police that she put the baby on the couch and went into the bathroom. While in the bathroom, she heard a knock on the door and was unable to immediately answer it. When she came out of the bathroom, the baby was gone from the couch and the front door was ajar. She immediately went outside and discovered the injured baby on the porch. (RR 3, p. 111-116, 208-211). There is nothing about this explanation that is inconsistent with the physical evidence and this exculpatory explanation is as plausible, or more so, than the State's theory of guilt. In fact, Petitioner's explanation is supported by the fact that an unidentified palm print was found on the door (RR 4, p. 84,

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[1] The Court of Appeals cited the blood testimony. However, there is no testimony that the child had blood on him and it is common knowledge that a mother who has recently given birth could very well have left blood around the house. (RR 3, p. 30). Moreover, the State did not exclude the possibility, or even the likelihood, that any blood allegedly matched to the baby, in fact, came from the mother and was a mixture of the baby's and mother's blood.

99) and the police found nothing in the apartment consistent with having caused the ligature marks on the baby. (RR 4, p. 81-82, 84, 103, 108). Again, the Court of Appeals opinion fails to recognize or discuss this.

3. There is not one iota of testimony that the baby's father, Ganguadaya Kavali, did any of the acts alleged in the indictment or in any way participated or played a role in the death of the baby. The evidence clearly and unequivocally established that Mr. Kavali was at the store with his daughter and was not home when the child was discovered to have been injured or killed. (RR 3, p. 92, 111-116, 208-211) (RR, Ex. 24). There is no evidence that he took any action to cause this or that he had any knowledge or participation. It is utter speculation without any evidentiary basis to suggest that he played a role. Therefore, the entire allegation based on the law of parties under Texas Penal Code §7.01 and 7.02 is not supported by sufficient evidence and under *Jackson* cannot support this verdict. Additionally, there is simply no basis to conclude that Petitioner had some knowledge of the commission of the offense and could have prevented it. Under the law of parties, the State was required to prove both that Mr. Kavali played a role in the offense, which they failed to prove and, if they proved that, Petitioner, acting with intent to promote or assist the commission of the offense, solicited, encouraged, directed, aided or attempted to aid Mr. Kavali in committing the offense. This is another area in which the State presented absolutely no evidence. Once again, the Court of Appeals opinion fails to analyze or discuss this argument.

Despite the fact that the evidence falls far short of that necessary to sustain a conviction, the Court of Appeals found the evidence sufficient. In so finding, the Court's opinion simply summarized the evidence and then stated:

> "We conclude this evidence is legally and factually sufficient to show Appellant committed the offense of capital murder. See Jackson, 443 U.S. at 319; Johnson, 23 S.W.3d at 11. We overrule appellant's first and second issues." (Court's Opinion p. 4).

This conclusion is disturbing not only because it is wrong, but also because it is totally devoid of any reasoning. With all due respect, a summary of the evidence and a conclusory overruling of the point raised is not reasoning.[2] The parties to this appeal deserve an opinion that analyzes the law and facts and this opinion fails in this regard. At the very least, the Court of Appeals opinion should point to the evidence, if any can be found, that establishes that Petitioner did the acts alleged or caused the death of her baby. Likewise, if the Court is upholding the verdict on the basis of the parties allegation[3], the evidence supporting a conclusion that Petitioner's husband was involved in the baby's death, if there is any, should be cited and discussed.

In fact, the evidence here fails far short of that necessary to sustain a conviction under *Jackson* and for this reason the

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[2] The Court's evidentiary summary only establishes that Petitioner was at the home where the baby was found to have been injured. In her brief, Petitioner cited *Johnson v. State*, 673 S.W.2d 190 (Tex. Crim. App. 1984) which states that mere presence at the crime scene is insufficient to prove that a person committed an offense. The Court of Appeals opinion neither cites nor discusses *Johnson* or the principle for which it stands.

[3] The Court of Appeals opinion is unclear as to whether the conviction is being upheld based on the State's theory that Petitioner was the primary actor or the alternative theory that Petitioner was guilty under the law of parties.

Texas Court of Appeals opinion is in violation of due process and should be reversed.

CONCLUSION

BASED ON THE FOREGOING ARGUMENTS, Petitioner pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-01-00835-CR

[Filed November 4, 2002]

ARUNA KAVALI,	)
Appellant	)
v.	)
	)
THE STATE OF TEXAS,	)
Appellee	)
	)

Appeal from the 380th District Court
of Collin County, Texas
Trial Court Cause No. 380-80476-01
Opinion delivered by Justice Bridges,
Justices Kinkeade and FitzGerald participating

JUDGMENT

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered November 4, 2002.

/s/ _____
David L. Bridges, Justice

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-01-00835-CR

[Filed November 4, 2002]

ARUNA KAVALI,	)
Appellant	)
v.	)
	)
THE STATE OF TEXAS,	)
Appellee	)
	)

On Appeal from the 380th District Court
of Collin County, Texas
Trial Court Cause No. 380-80476-01

OPINION

Before Justices Kinkeade, Bridges, and FitzGerald
Opinion By Justice Bridges

Aruna Kavali appeals her capital murder conviction. A jury found appellant guilty, and the trial court sentenced her to life in prison. In eight issues, appellant argues the evidence is legally and factually insufficient to support her conviction, the trial court erred in overruling her objections to the submission of the law of parties, certain language in the family code is unconstitutional as applied in this case, a juror was improperly excused over appellant's objection, and the prosecutor improperly commented on appellant's failure to

testify and implied appellant had a criminal record. We affirm the trial court's judgment.

On December 6, 1999, appellant gave birth to a baby that was in perfect health but had irregular genitalia. Specifically, the baby's genitalia at first appeared female but, after a series of tests, a pediatric endocrinologist determined the baby was a male. The endocrinologist, Grace Tannin, discussed the situation with appellant and her husband and presented the option of raising the baby as a girl, though the baby would then require reconstruetive surgery at a later date and would not be able to bear children. Alternatively, the baby could be raised as a boy, but Tannin could not say with certainty that the baby would be able to produce sperm or father children. Appellant and her husband elected to raise the baby as a boy and took him home on December 8, 1999. That same day, the baby died of blunt force head injury and ligature strangulation. Appellant was convicted of murdering her baby, and this appeal followed.

In her first and second issues, appellant complains the evidence is legally and factually insufficient to support her capital murder conviction. When reviewing challenges to the legal and factual sufficiency of the evidence, we apply well known standards. *See Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000); *see also Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The factfinder is the sole judge of the witnesses' credibility and their testimony's weight. *Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984). The factfinder may believe or disbelieve all or any part of any witness' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim.

App. 1986). When reviewing a case comprised wholly of circumstantial evidence, the standard of review is the same as it is for reviewing cases in which direct evidence exists. *King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000). A person commits capital murder if he intentionally or knowingly causes the death of an individual under six years of age. *See* TEX. PEN. CODE ANN. § § 19.02(b)(1); 19.03(a)(8) (Vernon 1994).

In this case, the record shows appellant told police that she left her baby sitting alone on the couch and went to the bathroom for approximately two minutes. The door of the bathroom was closed, and appellant said she heard a knock at the front door. Appellant called out, but she did not hear anything. Appellant came out of the bathroom three minutes later and discovered her baby was no longer sitting on the couch, and the front door of the apartment was open. Appellant went outside and discovered her baby lying dead on the porch.

Johnny Lynn Rudder, a firefighter and paramedic, arrived at appellant's apartment about the same time as police and a fire engine. When he walked inside appellant's apartment, Rudder found appellant, her husband, and her daughter "kind of walking around." Everyone in the apartment "had sort of a flat look on their face." Rudder asked what was wrong, but nobody responded. However, they all looked toward a couch where Rudder saw a baby lying on its back. Jeffrey Surles, another paramedic, came in and took the baby outside to the ambulance where Rudder used a bag-valve mask to try to get the baby breathing. Rudder noticed the baby's head was "like a bag of water" with nothing solid along the top part of the skull. Rudder also discovered a red line on the baby's neck as

if someone had used a cord to strangle it. Nevertheless, the baby's face was very clean as if it had just had a bath.

Collin county medical examiner William Rohr performed an autopsy on appellant's baby and determined the baby died from blunt force head injury and ligature strangulation. In addition, Rohr detected caffeine in the body and found fragments of green glass in the baby's mouth, stomach, and small intestine. David Walker Spence, supervisor of the trace evidence section at the Southwest Institute of Forensic Science testified the glass fragments found in the baby's body matched fragments in a mortar and pestle found in appellant's kitchen and the "P-traps" of two sinks in appellant's apartment.

Dallas police officer Frank Della testified the porch outside the door of appellant's apartment was clean, and the potted plants sitting on the porch were sitting upright. The record does not indicate that any physical evidence was recovered from the porch. Police recovered a latent palm print from the outside of the front door, but the print was not identified. Dallas police detective Daniel Krieter testified he could not tell how old the palm print was and that prints could remain on a surface indefinitely.

Timothy Kalafut, a forensic DNA analyst, testified he compared DNA samples from appellant, her baby, and her husband and daughter with blood samples taken from her apartment. On a sheet from the bed in appellant's master bedroom and on the carpet in the master bedroom, Kalafut found stains that were possibly a mixture of appellant's, her daughter's, and her baby's blood. Kalafut's DNA test indicated a male contributed to the samples, and the only other male in the family, appellant's husband, was excluded.

Kalafut also tested a bloodstain found on a wet towel in appellant's master bathroom, but he was unable to isolate any DNA from the towel because it was too wet. Thus, the evidence developed at trial showed the baby's blood was on the bed and on the carpet in the master bedroom.

In appellant's apartment, a mortar and pestle was found containing glass fragments matching those found in the baby's body - glass fragments that had time to travel through the baby's body and into the baby's small intestine. Rohr testified the glass fragments would not necessarily have stopped moving through the baby's system at death; however, Rohr had only seen one example of such movement after death and never in an infant. Rohr testified the glass had to be in the baby "for some time," but he agreed there was no way to tell how long. Despite the severity of the baby's head injury, the baby appeared clean as if it had just had a bath. We conclude this evidence is legally and factually sufficient to show appellant committed the offense of capital murder. *See Jackson*, 443 U.S. at 319; *Johnson*, 23 S.W.3d at 11. We overrule appellant's first and second issues.

In her third issue, appellant argues the trial court erred in submitting to the jury an instruction on the law of parties because there is no evidence to show that her husband murdered the baby or that she acted with intent to promote or assist her husband in murdering the baby. A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994). Evidence is sufficient to support a conviction under the

law of parties where the actor is physically present at the commission of the offense and encourages the commission of the offense either by words or other agreement. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). In determining whether a defendant participated in an offense as a party, the court may examine the events occurring before, during, and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to commit the offense. *Id.*

On the day of the murder, Casey Larowe, appellant's neighbor, heard some loud talking from appellant's apartment next door and went to investigate. Larowe looked in appellant's open doorway and saw appellant holding her baby and talking loudly in another language on the telephone. The baby was limp and unmoving, and Larowe stood in appellant's doorway and asked if she needed help. Appellant did not answer and remained on the telephone. Larowe, dressed in her nightgown, went back to her apartment and threw some clothes on.

Approximately two minutes later, Larowe returned to appellant's apartment and again asked if appellant was okay. Appellant did not answer but, when Larowe said she was going to call 911, appellant said somebody knocked on her door, came in, took her baby, beat it and threw it outside. Larowe took the baby from appellant and put the baby on the couch. Throughout this exchange, appellant remained on the telephone. Larowe checked the baby for a pulse and found none. When Larowe tilted the baby's head back, her hand sank into the baby's scalp. Frantic, Larowe asked if appellant had called 911. Appellant did not respond. Soon thereafter, appellant's husband and daughter came in the door of the

apartment, and appellant's husband did not pick up the baby but called someone on the telephone instead. Larowe could not understand what appellant's husband was saying. When appellant's husband got off the telephone, Larowe called 911 and remained in the apartment until police and paramedics arrived.

Appellant argues there is no evidence to show her husband murdered the baby, and an instruction on the law of parties was therefore inappropriate. Although appellant's husband was not present in the apartment when Larowe came to investigate appellant's loud talking, the baby had already suffered a massive head wound and stopped breathing by that time. We have already concluded the evidence was legally and factually sufficient to show appellant murdered her baby. If the evidence clearly supports appellant's guilt as a principal actor, any error in charging on the law of parties is harmless. *Black v. State*, 723 S.W.2d 674, 675 (Tex. Crim. App. 1986); *Reyes v. State*, 910 S.W.2d 585, 593 (Tex. App.-Amarillo 1995, pet. ref'd). In addition, we conclude a rational jury could have found beyond a reasonable doubt that, if appellant did not murder her baby, she encouraged, aided, or directed her husband to do so. *See Ransom*, 920 S.W.2d at 302. We overrule appellant's third issue.

In her fourth issue, appellant argues the trial court erred in overruling her objection to the submission of the law of parties because she was not under a legal duty to prevent a criminal offense against her baby. In her fifth issue, appellant makes the related argument that family code section 151.001 is unconstitutionally vague in imposing on a parent a duty of "protection" of the parent's child. The penal code provides that a person is criminally responsible for an offense

committed by the conduct of another if, having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense. TEX. PEN. CODE ANN. § 7.02(a)(3) (Vernon 1994). The jury instructions in this case, quoting *section 151.001 of the Texas Family Code*, stated that a parent has "the duty of care, control, protection of the child, and reasonable discipline of the child." *See* TEX. FAM. CODE ANN. § 151.001(a)(2) (Vernon Supp. 2002). The charge further instructed the jury to find appellant guilty of capital murder if it found beyond a reasonable doubt that appellant's husband killed the baby and appellant, "having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, failed to make a reasonable effort to prevent commission of the offense." *See* TEX. PEN. CODE ANN. § 7.02(a)(3) (Vernon 1994).

Appellant argues it is contrary to the intent of the family code to impose on a parent the legal duty to protect a child from the commission of a criminal act by a third party. However, the charge in this case does not impose such a duty. Instead, the charge authorized a conviction only if, having a legal duty to prevent commission of the offense and *acting with intent to promote or assist its commission*, appellant failed to make a reasonable effort to prevent the offense. We conclude that, to authorize a conviction, this instruction required appellant to have the intent to promote or assist her husband in murdering her baby and, contrary to appellant's arguments, did not unreasonably require appellant to protect her child from every potential threat to avoid prosecution for capital murder.

Appellant complains further that the language referring to "protection of a child" is impermissibly vague. A statute is void for vagueness when it fails to give a person of ordinary intelligence fair notice of what the statute requires or is so indefinite that it encourages arbitrary arrests and convictions. *See Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996). We conclude that the language referring to "protection of a child" gave fair notice that appellant should not feed her baby ground glass, strangle her baby with a ligature, or crush her baby's skull, nor should she permit another individual to do so. We overrule appellant's fourth and fifth issues.

In her sixth issue, appellant complains the trial court erred in excusing a juror over appellant's objection. Specifically, appellant complains of the dismissal of a juror who had an ill six-month-old child and needed to take the child to the doctor. The juror had no one else to take the child to the doctor, and the trial court found the juror was disabled and seated an alternate juror. Appellant objected that the juror was not disabled under *article 36.29 of the Texas Code of Criminal Procedure*. The trial court overruled appellant's objection and seated the alternate juror. We cannot conclude the trial court abused its discretion in finding that the excused juror was disabled by her inability to find a means of taking her baby to the doctor other than by taking the baby herself. *See Edwards v. State*, 981 S.W.2d 359, 366 (Tex. App.-Texarkana 1998, no pet.) (holding juror's inability to find child care for her fourteen-year-old son rendered juror "disabled" within meaning of code of criminal procedure); *see* TEX. CODE CRIM. PROC. ANN. Art. 36.29 (Vernon Supp. 2002). We overrule appellant's sixth issue.

In her seventh issue, appellant complains the trial court erred in failing to declare a mistrial when the prosecutor referred to appellant's failure to testify. Specifically, appellant complains of the following exchange during appellant's closing argument:

> [DEFENSE COUNSEL]: I think it's unthinkable that you have lived in proximity with this woman for the last five days, and you've observed her for 30 or 40 hours, and you must get some vibrations from her.
>
> [PROSECUTOR]: Judge, I'm going to object to that, commenting on a defendant's demeanor when she has not testified. We can't go into that.
>
> [DEFENSE COUNSEL]: I object to them calling to the attention of the jury the fact that she hasn't testified. That's a direct comment on her failure to testify, and I'd ask for a mistrial at this time. That's unconscionable.
>
> [THE COURT]: I'll tell you what. I'll instruct the jury to disregard any comment with regard to whether or not the defendant has testified. Go ahead.

It appears that, although defense counsel objected to the prosecutor's statement and moved for a mistrial, the trial court did not rule on defense counsel's objection. Also, defense counsel did not pursue a specific ruling on his motion for mistrial. As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court, and the trial court ruled on the request, objection, or motion. *See* TEX. R. APP. P. 33.1.

Here, defense counsel did not obtain a ruling on his motion for mistrial and, thus, did not preserve this issue for our review.

Nevertheless, it appears from the above-quoted exchange that the prosecutor was objecting to defense counsel's implication that appellant's "vibrations" indicated her innocence even though appellant did not testify. We note that it was defense counsel who twice referred to appellant's failure to testify. Even assuming the prosecutor's objection can be construed as a comment on appellant's failure to testify, we conclude the trial judge's instruction to disregard cured the error, if any. *See Moore v. State*, 999 S.W.2d 385, 405 (Tex. Crim. App. 1999) (instruction to disregard will cure all but most egregious errors); *Brokenberry v. State*, 853 S.W.2d 145, 153 (Tex. App.-Houston [14th Dist.] 1993, pet. ref'd) (instruction to disregard sufficient to cure error where prosecutor's statement indirectly referred to appellant's failure to testify). We overrule appellant's seventh issue.

In her eighth issue, appellant complains the trial court erred in denying her motion for a mistrial when the prosecutor improperly implied that appellant had a criminal record. Specifically, appellant complains of the prosecutor's statement during the State's final argument that defense counsel knew "that in a criminal trial we're not allowed to bring up any criminal history of the defendant." Appellant argues this comment created a false impression with the jury that appellant had a criminal record that the State was prevented from bringing to the attention of the jury.

We note that defense counsel immediately asked for and received an instruction to disregard the prosecutor's

statement. Generally, a prompt instruction to disregard will cure an inadvertent reference to an extraneous offense. *See Ovalle v. State*, 13 S.W.3d 774, 783 (Tex. Crim. App. 2000). Unless the extraneous offense is so calculated to inflame the minds of the jury or is of such a nature as to suggest the impossibility of withdrawing the impression produced, an instruction to disregard can cure any improper impression. *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992). Here, the prosecutor did not refer to any extraneous offense, and we conclude the prosecutor's implication that the State could not bring up appellant's criminal history was not so calculated to inflame the minds of the jury and was not of such a nature as to suggest the impossibility of withdrawing the impression produced. *See Gardner v. State*, 730 S.W.2d 675, 696-97 (Tex. Crim. App. 1987). Therefore, the trial court did not err by failing to grant appellant's request for a mistrial, and the prompt instruction cured any improper impression created by the prosecutor's statement. *See Ovalle*, 13 S.W.3d at 783. We overrule appellant's eighth issue.

We affirm the trial court's judgment.

/s/ _____
DAVID L. BRIDGES
JUSTICE

APPENDIX B

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-01-00835-CR

[Filed January 10, 2003]

ARUNA KAVALI,	)
Appellant	)
v.	)
	)
THE STATE OF TEXAS,	)
Appellee	)
	)

ORDER

Before Justices Bridges, FitzGerald, and Kinkeade[1]

The appellant's Motion for Rehearing filed December 3, 2002, is **DENIED**.

[1] The Honorable E. Kinkeade, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, was a member of this Court when this case was submitted and subsequently decided. However, Justice Kinkeade did not participate in the disposition of this motion.

/s/ _____
DAVID L. BRIDGES
JUSTICE

APPENDIX C

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

6/11/2003

COA#: 05-01-00835-CR

RE: Case No. PD-0176-03

STYLE: KAVALI, ARUNA

On this day, the Appellant's petition for discretionary review has been refused.

Troy C. Bennett, Jr.